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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLIAM H. FAUVER, COMMISSIONER OF CORRECTIONS, AND JOSEPH CALL, DEPUTY DIRECTOR OF ADULT INSTITUTIONS,

Petitioners,

v.

TIMOTHY RYAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF QUESTION PRESENTED

Where state officials knowingly interfere with the implementation of a federal court order to remedy conditions and practices in a county jail by forcing the county to house dangerous state prison inmates, knowing that the county lacks appropriate facilities for those inmates and knowing that the lack of classification procedures in the county jail will cause those dangerous inmates to be housed in overcrowded conditions with inexperienced inmates whom they are likely to victimize, in violation of clearly established rights of the plaintiff the existence of which the state officials do not challenge, and an assault upon plaintiff results, are they entitled to appellate review and reversal of the District Court's Order denying them qualified immunity?

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COUNTERSTATEMENT OF THE CASE

The petitioners' Statement of the Case is replete with inaccurate statements regarding the state of the record. To correct each such statement would take far more than the thirteen pages petitioners devote to their Statement of the Case; rather than consume the time of the Court with each detail, respondent will present a summary of those facts which are most important to the Court's resolution of this Petition.

Timothy Ryan, the plaintiff, was arrested on 9/30/83 for failure to appear in court regarding some traffic tickets, and was placed in cell 208 of the Burlington County Jail in Mount Holly, New Jersey. Ryan had never been in the Burlington County Jail before. One of his cellmates, Maurice Scott, was a convicted felon with a lengthy history of violent assaults on other inmates during his twelve

prior incarcerations at Burlington County Jail. Scott had committed a crime involving death or serious bodily injury under N.J.S.A. 2C:43-3.1 a.(1) and was ordered to pay a fine to the Violent Crimes Compensation Board, see Joint Appendix p. 379. On October 4, 1983, Scott attacked Ryan,[1/] causing serious injury.

Maurice Scott was serving a state prison sentence; under the applicable New Jersey statutes, he would have been housed in a state prison rather than a county jail. However, petitioners Fauver and Call had authority, under an Executive Order of the Governor, to refuse to accept inmates from the counties who ordinarily would have been shipped to the State within 15 days of sentencing. Scott was approximately two

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1/ This assault was not, as petitioners indicate, a "fight." Ryan never struck a blow, and Scott was convicted of aggravated assault.

months overdue for transfer as of October 4, 1983.

The Burlington County Jail is described in some detail in the District Court's Opinion, p. 37a - 45a. The jail provided inadequate space, lighting, heating and ventilation; there were no programs for inmates and no recreation facilities inside or outside the jail, and no dining area or dayrooms, see State Inspection Report of 2/15/83, Joint Appendix p. 258-273. Consequently, inmates spent 24 hours a day in filthy, overcrowded cells where they ate, slept, showered, and performed all bodily functions. To worsen matters, the jail officials had no procedures for classifying inmates. "Classification" refers to the review of inmates and their placement in different housing areas within the jail based upon various factors, including propensity for violence. Proper classification separates

bullies from victims, for the protection of inmates and guards. Petitioners do not challenge the lower court's holdings that the conditions of the jail were unconstitutional or that Ryan had a clearly established right to be housed separately from known dangerous sentenced inmates like Scott who posed a threat to his personal security, see District Court Opinion, p. 53a, 55a.

Fauver and Call had extensive, detailed knowledge as to the conditions of the Burlington County Jail. The record shows that Fauver read inspection reports of the jail's conditions which described all of the deficiencies discussed above, see Third Circuit Opinion, p. 22a, n. 15. These deficiencies violated minimum standards under state law which Fauver had established and was responsible for enforcing, known as the "Manual of Standards for Adult County Correctional

Facilities," portions of which appear in the Joint Appendix at 431. Fauver and Call were also aware that a class action lawsuit brought by inmates against the county challenging the conditions of confinement had resulted in a consent decree limiting the population of the jail[2/] and mandating extensive renovations to the facility and major changes in jail procedure, including provision for a classification system, see Consent Decree, Joint Appendix p. 351-378. In December of 1982, the County Solicitor, Michael Hogan, informed Fauver that the County had not yet complied with the decree, which was intended, in Hogan's words, "...to substantially improve the

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2/ The population was restricted to 117. On 10/4/83, the population was 147, 24 of whom were state inmates. Eighty percent of the excess population thus was attributable to Fauver and Call's placement of state inmates in the jail.

physical plant to constitutional standards." Hogan told Fauver that a reduction in population would bring the jail within constitutional standards, see District Court Opinion, p. 43a.

After Burlington County entered into its consent decree, Fauver and Call stopped removing state inmates from Burlington County Jail within the statutory 15 days of eligibility for transfer, and instead instituted a system in which Call would telephone the county weekly and announce how many state inmates he would take from the county that week. His contact at the Burlington County Jail, Timothy Cooper, pleaded with him to remove the state inmates, but Call disregarded those pleas, see District Court Opinion, p. 46a. The Solicitor, Hogan, wrote a letter to Fauver in December of 1981, further pleading for the removal of inmates, calling Fauver's attention to the consent decree, and

warning that a "major disaster" would result from the continued housing of state inmates at the Burlington County Jail. Fauver testified that he believed that Hogan meant that a "riot or hostage taking" would occur, Joint Appendix at 753-754. However, Fauver refused to remove his inmates and indicated that he would be willing to give Burlington County only "piecemeal relief." The record does not reflect any relief, piecemeal or otherwise, being given to Burlington County Jail.

Fauver and Call knew that Burlington County Jail had no classification system, through inspection reports and the consent decree. They knew also that classification becomes increasingly difficult as a facility becomes more and more over-crowded. Fauver wrote a report on this subject, in which he discussed how "prolonged use of total bedspaces within an institution could lead to significant

management control problems and increase the potential for serious disruptions," see District Court Opinion, p. 36a. The County officials claim that it was the over-crowding, caused principally by state inmates, which prevented them from classifying inmates. Edgar Pierce, the Lieutenant at the Jail, testified that the only thing preventing proper classification in October of 1983 was "the horrendous population we had," Joint Appendix at 496.

The record thus shows that Fauver and Call knew in detail the conditions of the Burlington County Jail and knew quite specifically how their conduct in packing the jail beyond capacity with state inmates would affect those conditions. Fauver and Call knew that the County Jail was in violation of state and federal law and in violation of a federal remedial court order, and they knew that the convicted felons whom they placed in the jail would

be housed with traffic offenders and hitchhikers whom they would victimize. They knew that their acts were the cause of violations of the federal court order in the inmate class action suit. They were warned by the inspection reports and the consent decree of the danger of putting state inmates in the Burlington County Jail, and the Jail Officials and the County Solicitor begged them to remove this dangerous population from the jail. Fauver and Call refused to do so, knowing that they were violating the rights of inmates who would be victimized by this conduct.

Plaintiff sued Fauver and Call, claiming that they should not have injected this dangerous state inmate population into the County Jail when they knew the jail had no means of handling these inmates. The District Court agreed. The Third Circuit, affirming, stated that "considering the information available to Fauver and Call,

no official of their stature could reasonably have thought that continuing to place state inmates in the Burlington County Jail with no more than an ad hoc system for their removal was lawful," see Opinion, p. 24a. The Third Circuit's Opinion also contains some comments which could be taken to mean that Fauver and Call had a duty to establish a system of classification of inmates in the Burlington County Jail. Those comments are dicta.

REASONS FOR DENYING THE WRIT

I. REVIEW OF THE THIRD CIRCUIT'S DECISION WOULD BE INCONSISTENT WITH MITCHELL V. FORSYTH AND THE COLLATERAL ORDER DOCTRINE.

The Court held in Mitchell v. Forsyth, 472 U.S. 511 (1985), that orders denying qualified immunity are "final orders" under the collateral order doctrine. However, Mitchell permits appellate review only of the "purely legal" question of whether the record supports a claim of violation of clearly established law, Mitchell v. Forsyth, 472 U.S. 511, 528 n. 9 (1985). To the extent the court's later ruling in Anderson v. Creighton, 483 U.S.___, 107 S.Ct. 3034 (1987) makes this inquiry fact specific, the reviewing court must examine the information which the defendants had and the specific acts of which the defendants are accused in order to determine whether a reasonable official

could have believed those acts to be lawful. However, the collateral order doctrine does not give a reviewing court jurisdiction to re-examine whether genuine issues of material fact under Federal Rule of Civil Procedure 56 are posed by the record. Fauver and Call's challenge to the lower court's ruling is not directed to the issue of whether plaintiff's rights were clearly established; rather, it is directed to Fauver and Call's disagreement with the Court of Appeals as to the existence or non-existence of genuine issues of material fact regarding Fauver and Call's knowledge and personal involvement in the violation of those rights.[3/] It is therefore respectfully submitted that the Court should not review this dispute.

3/ As is noted above, Fauver and Call's disregard of the facts demonstrated by the record so pervades the petition that plaintiff cannot address each misrepresentation and still be concise.

II. FAUVER AND CALL'S PETITION SEEKS REVIEW OF FACTUAL, RATHER THAN LEGAL, QUESTIONS.

Whether or not the collateral order doctrine applies, it is not worthwhile for the Supreme Court to engage itself in settling disputes of fact. Here, petitioners Fauver and Call claim that they had only "generalized knowledge" of conditions at the Burlington County Jail, while both courts below have found after thorough review of the record that a genuine issue of material fact exists as to whether Fauver and Call had the specific knowledge of conditions which the documentary evidence suggests they had.[4/] The Question Presented for review by Fauver and Call can

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4/ Fauver and Call appear to contend that, if they denied knowledge of specific conditions in their depositions, that denial is binding upon the plaintiff regardless of other evidence in the record which contradicts Fauver and Call's denial. This position carried little weight with the District Court or with the Court of Appeals.

be reached only if the Court reverses the factual determinations of both lower courts, since the Question Presented is premised upon Fauver and Call having only "generalized knowledge" of the conditions at the Burlington County Jail.

Because Fauver and Call refuse to concede that various facts are in issue, if the Court were to grant certiorari the bulk of the Court's energies on review of this matter would be devoted to resolving disputes as to the existence of genuine issues of material fact. Resolution of such issues by the Court consumes its energy but produces nothing of precedential value.

III. PETITIONERS SEEK REVIEW OF DICTA REGARDING ISSUES OF NEW JERSEY STATE LAW WHICH ARE OF NO ENDURING IMPORTANCE.

In pages 16 to 21 of their Petition, Fauver and Call ask the Court to reverse certain dicta within the Third Circuit's ruling which suggests that Fauver and Call may have had an affirmative duty, under the terms of an Executive Order of the Governor of New Jersey, to establish a system permitting classification of inmates in county jails. They contend that this interpretation of the Order is erroneous. The Third Circuit's holding, however, is not dependent upon the existence of such a duty; the court held that it was the failure of Fauver and Call to remove their inmates from the Burlington County Jail which violated plaintiff's rights, see Opinion of Third Circuit, p. 24a. Even if the Third Circuit's ruling contains inaccurate dicta, its holding would stand.

The issue posed is whether the Court of Appeals accurately interpreted an Executive Order of the Governor of the State of New Jersey. Resolution of this issue would have no impact upon this litigation and no impact upon jurisdictions other than New Jersey, and plaintiff therefore submits that the issue is not of sufficient importance to other federal courts to warrant the Court's attention.

IV. THE THIRD CIRCUIT'S RULING DOES NOT CONFLICT WITH HARLOW V. FITZGERALD, 457 U.S. 800 (1982), MITCHELL V. FORSYTH, 472 U.S. 511 (1985) OR ANDERSON V. CREIGHTON, 483 U.S._____, 107 S.CT. 3034 (1987).

Petitioners claim that the Third Circuit's decision conflicts in principle with the Supreme Court's decisions regarding qualified immunity. The Third Circuit found no such conflict, and cited these same decisions in its support. Fauver and Call's argument is simply that the Third Circuit's ruling is in error; Ryan disagrees.

It is well-established law that state officials who place inmates in county facilities are responsible for the constitutionality of those facilities, see Stewart v. Winter, 669 F.2d 328, 333 (5th Cir. 1982). Fauver himself had been ordered, in Union County Jail Inmates v. DiBuono, 713 F.2d 984 (3rd Cir. 1983), to remove inmates from a County Jail as part

of a remedial scheme, see discussion in Third Circuit Opinion, p. 23a, footnote 16, and thus Fauver was personally aware that he could be held liable for constitutional deprivations which resulted from his placement of state inmates, even if those deprivations occurred in county jails.

Fauver and Call's position, stripped to its essentials, is this: Fauver and Call may place inmates in county jails with no concern for what happens to those inmates or to the counties who are forced to house them. If Burlington County Jail were a muddy hole in the ground, Fauver and Call would insist that it is their right to put as many state inmates in that hole as they like, and that the fact that it is a muddy hole is the county's fault and not theirs, even though they knowingly subject inmates in their care to those conditions. Once inmates are out of sight, they are out of mind, and Fauver and Call may pack county

jails and subject inmates in those jails to brutal and inhumane conditions with impunity. It is this very attitude on Fauver and Call's part which Ryan challenges by way of this suit.

Fauver and Call knew of a Federal Court Order limiting population at the Burlington County Jail. Rather than respect the obligations of the parties to that Order, they deliberately interfered with its implementation by packing the Burlington County Jail with dangerous inmates despite the repeated pleas of the County, rendering compliance with the order by the County impossible. Interference with a Court Order is wrongful even when one is not a party to the Order, United States v. Hall, 472 F.2d 261 (5th Cir. 1972), cited with approval in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 692, n. 32 (1979). Having interfered with

a remedial Court Order in the face of repeated specific warnings that their acts were the cause of violations of both federal and state law, Fauver and Call now seek a ruling that their acts were objectively reasonable under Harlow. The Third Circuit's rejection of their position is hardly novel, and is consistent with the principles of qualified immunity. Fauver and Call's claim that they were denied qualified immunity due to "a mistaken but reasonable belief that county officials were properly managing the county jail," Petition at 21, is frivolous. The record shows specific knowledge by Fauver and Call that the jail was mismanaged and was an unsuitable place to put dangerous state sentenced inmates. Fauver and Call must live with that record.

While the particular juxtaposition of parties presented by this case may be unusual, the legal principles implicated

are straightforward. The petition is devoid of any suggestion why basic principles of constitutional law should be modified to accommodate Fauver and Call.

CONCLUSION

For the foregoing reasons, respondent-plaintiff, Timothy Ryan, respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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